Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States
October Term, 1996

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CLEVELAND, OKLAHOMA, ET AL.,

Petitioners,

v.

JERRY SHINAULT,

Respondent.

Petition For A Writ of Certiorari To The United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Tenth Circuit has correctly interpreted Johnson v. Jones, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), and Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), as depriving the court of jurisdiction to review de novo whether the plaintiff has sustained his initial burden of proof of motivation pursuant to Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), and Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), because the trial court found that motive was a material question of fact in plaintiff's First Amendment retaliation claim. That is, where the trial court has found that the issue of motive is a disputed question of material fact, is the Tenth Circuit, under Johnson v. Jones, deprived of jurisdiction to review that finding as a matter of law, or is such a result by either court below a vast departure from the accepted and usual course of judicial proceedings which are required by Mt. Healthy and Harlow, so as to call for an

exercise of this Court's supervisory power? Sup. Ct. R. 10.

2. Whether the Tenth Circuit Court of Appeals erred in finding it lacked jurisdiction over George Skinner's qualified immunity appeal of questions of law, because the trial court found that the issue of motive is a disputed question of material fact, thereby entering a decision in conflict with the decisions of various United States courts of appeals on the issue of the appealability of orders denying claims of qualified immunity pursuant to Johnson v. Jones, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), and Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996). Sup. Ct. R. 10.

II. PARTIES TO THE PROCEEDING

Parties to the proceeding in the Tenth Circuit were as follows:

Jerry Shinault, Appellee/Cross Appellant (Respondent herein)

vs.

Board of County Commissioners of the County of Cleveland, a Political Subdivision of the State of Oklahoma; George Skinner, Leroy Krohmer and Jan Collins, County Commissioners as public officers in their official capacities[1]; and George Skinner, in his individual capacity, Appellants/Cross-Appellees (Petitioners herein).

There are no parent companies or nonwholly owned subsidiaries of the parties.

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[1]The claims against Krohmer and Collins, and against Skinner in his official capacity, are in reality claims against Cleveland County, see Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), and the District Court so treated them. (App. 1.) This brief generally refers only to the two real defendants/petitioners: Cleveland County and George Skinner.

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The District Attorney or his assistants shall give opinion and advice to the board of county commissioners and other civil officers of his counties when requested by such officers and boards, upon all matters in which any of the counties of his district are interested, or relating to the duties of such boards or officers in which the state or counties may have an interest.

V. CITATIONS OF REPORTS OF OPINIONS ENTERED IN THIS CASE

Shinault v. Cleveland County Bd. of County Com'rs, 82 F.3d 367 (10th Cir. 1996).

VI. BASIS FOR JURISDICTION OF THE COURT

(i) Petitioners seek review of the judgment of the Tenth Circuit Court of Appeals entered on April 26, 1996 (App. 1-10).

(ii) Rehearing was denied by the court of appeals on May 30, 1996 (App. 52-53).

(iii) Petitioners rely upon 28 U.S.C. §§1254(1) and 2101(c) to confer on this Court jurisdiction to review the decision of the Court of Appeals on writ of certiorari.

(iv) No notifications are required by Rule 29.4(b) or (c) of the Rules of the Supreme Court.

VII. STATEMENT OF THE CASE

A. Procedural posture of the case including basis for federal jurisdiction of district court.

Pursuant to 28 U.S.C. §1331, a district court has original jurisdiction over any civil action arising under the Constitution or laws of the United States. Respondent Jerry Shinault filed this action

in federal district court, alleging that petitioners, Board of County Commissioners of Cleveland County ("Cleveland County"), George Skinner, Leroy Krohmer and Jan Collins violated the Fourteenth Amendment by depriving him of liberty and property without due process, and denied him First Amendment association rights. Only Skinner was sued individually. Shinault also brought claims of conspiracy under 42 U.S.C. §1985, and pendent state law claims for malicious prosecution, defamation and the infliction of emotional distress.

On August 25, 1994, the district court granted summary judgment to all defendants on all claims except those under the First Amendment, and denied Skinner's qualified immunity claim. (App. 11-51.) Skinner appealed the trial court's denial of qualified immunity, asserting that as a matter of law Shinault did not establish:

(1) that protected conduct occurred; or

(2) that protected conduct was a motivating factor in Skinner's decision to terminate Shinault's employment, both pursuant to Mt. Healthy City

School District v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), or

(3) that Skinner violated clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

(App. 54-99.) Pursuant to the pendent appellate jurisdiction doctrine, Swint v. Chambers County Commission, ___ U.S. ___, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995), all defendants appealed the denial of summary judgment on the First Amendment. Shinault cross-appealed the grant of summary judgment on his due process, equal protection, and federal conspiracy claims. (App. 100-131.)

B. Facts material to consideration of the questions presented.

This case arises out of the termination of employment of respondent, Jerry Shinault, from his position as Cleveland County, Oklahoma, District 2 road foreman. The chronology of events and material facts before the district court were for the most part not in dispute. (App. 72-78, 103-114). In any event, it was Skinner's

position in the Tenth Circuit that looking at the evidence in the light most favorable to Shinault, under the facts as found by the trial court, Skinner was entitled to qualified immunity as a matter of law. (App. 58, 64, 89-93.)

From 1986 until 1990, Shinault was an employee of Cleveland County District 3. (App. 12.) In 1990, he ran for the position of County Commissioner for Cleveland County District 2, losing in a three-way Democratic primary. Skinner, who won the Democratic primary, was ultimately elected the District 2 County Commissioner and took office at the beginning of 1991. (App. 20.)

After Skinner assumed office, he hired Shinault as the District 2 road foreman, which is essentially the top unelected position in the district. Shinault left his job with District 3 and began his new job, in District 2, in January, 1991. This was the first job Shinault had ever held with District 2, and constituted a significant promotion and pay raise over Shinault's previous job with the District 3 Commissioner. (App. 72-74, 103-4.)

It was undisputed, and the trial court so found, that in July,

1991, Skinner held a meeting with Shinault to discuss rumors Skinner had heard that District 2 employees were using county equipment on private property without authorization. Skinner and Shinault discussed the fact that it was improper for a county employee to use county equipment, funds or materials on private property. The next day, Skinner met with all District 2 employees, including Shinault, and again stated that it was improper and unlawful for a county employee to use county equipment, funds or materials on private property. (App. 13.)

A few weeks later, on August 25, 1991, Skinner received a telephone call from Leroy Krohmer, District 3 County Commissioner. Krohmer told Skinner that he had received telephone calls from two citizens complaining that the driveway of a county employee who lived in District 2 had been oiled and chipped with county equipment. At that time, employees of District 2 had just completed an oil and chip paving project for the Little Axe School District. (App. 13-14.)

Skinner and Krohmer drove by the Little Axe project and discovered that the driveway of James Bruesch, a county employee,

had been freshly oiled and chipped. Bruesch's driveway lies within District 2. After observing the site, Skinner contacted his son-in-law and personal attorney, Blake Virgin, to discuss the matter. Shinault and Virgin then held a meeting with Skinner at which Skinner admitted he was aware that county employees oiled and chipped Bruesch's driveway with county equipment, and stated that he had even been present during at least part of the project. (App. 14.)

The next day, August 26, 1991, Skinner reported his findings to the Cleveland County District Attorney's office. (App. 15.) By law, the District Attorney is the County Commission's legal adviser. Okla.Stat.tit. 19, § 215.5 (1991). The Cleveland County District Attorney's office instituted an investigation of Shinault and other employees involved in the driveway incident. A district attorney's investigator met with several county employees who had been present during the incident, and with the school district officials responsible for the Little Axe project. The employees stated that they knew use of the county equipment on Bruesch's driveway was a violation of county policy, but they were afraid either to object or to refuse to

participate in the oiling and chipping of Bruesch's driveway. (App. 15-16, 76-77, 108-12.)

The investigator also interviewed Bruesch, who admitted that he had allowed county employees to use county equipment to oil and chip his driveway. Furthermore, he interviewed Shinault, who admitted that he had been present, and stated that he did not stop his employees from applying the oil and chip to Bruesch's driveway. (App. 6.)

The District Attorney advised Skinner that it was appropriate to terminate Shinault's employment because of his participation in the misuse of county equipment (App. 77, 113). Shinault's employment was then terminated in September 1991. (App. 15.) Skinner also disciplined Bruesch, by suspending him without pay. Another employee received a severe reprimand. (App. 77-78, 113.)

On November 7, 1991, the State of Oklahoma filed criminal complaints against Shinault and Bruesch. On February 4, 1992, Bruesch pleaded guilty to a misdemeanor charge of misusing county equipment. Shinault pleaded not guilty to a charge of embezzlement,

and was tried before a jury. On May 20, 1992, the jury found Shinault not guilty. (App. 16-17.)

The trial court found, and it was uncontested, that prior to the 1986 election, Shinault and County Commissioner Leroy Krohmer (named as a defendant in his official capacity only) had been close friends. After Krohmer, who was District 3 County Commissioner prior to 1986, was defeated for reelection in 1986, Shinault informed Krohmer that he had agreed to go to work for Steely, the District 3 Commissioner who defeated Krohmer. Krohmer became upset because he thought Shinault had worked against him in the 1986 County Commissioner's race. Shinault and Krohmer have not been friends since that time. (App. 21.) While many of the facts relied upon by Shinault in his lawsuit relate to the animosity between Shinault and Krohmer, who was restored to his seat as County Commissioner by the 1990 election, it was Skinner, not Krohmer, who had the right to hire and fire District 2 employees.

VIII. ARGUMENT IN SUPPORT OF THE ALLOWANCE OF THE WRIT

PROPOSITION I:

THE TENTH CIRCUIT, RELYING ON JOHNSON V. JONES TO FIND IT LACKED JURISDICTION OVER SKINNER'S APPEAL OF DENIAL OF HIS CLAIM OF QUALIFIED IMMUNITY, HAS CONSTRUED JOHNSON V. JONES AS OVERRULING MT. HEALTHY CITY SCHOOL DISTRICT V. DOYLE. MT. HEALTHY HELD THAT A PLAINTIFF MUST, AS A MATTER OF LAW, SUSTAIN AN INITIAL BURDEN OF PROOF OF CAUSATION TO OVERCOME A DEFENDANT'S CLAIM OF QUALIFIED IMMUNITY.

SUCH A CONSTRUCTION OF JOHNSON CONSTITUTES ERROR AND IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

A. Summary of argument.

Oral argument in this matter, before a three-judge panel of the Tenth Circuit Court of Appeals, was held on March 5, 1996, approximately 13 days after this Court's decision in Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996). The decision in Behrens, discussed in oral argument at length by counsel for Skinner, reaffirmed already well-established precedent that a district court order denying qualified immunity, to the extent it turns on an abstract question of law, is immediately appealable. See also, Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411

(1985).

The Tenth Circuit decision ignored Behrens, and relied solely on Johnson v. Jones, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), to find it lacked jurisdiction of Skinner's appeal. Saying that "the district court found that a genuine issue of material fact existed as to whether Skinner fired Shinault for engaging in constitutionally protected political activities," the court ruled that "under Johnson, that finding is unreviewable." (App. 9.)

The circuit court continued:

> Skinner counters that, under Johnson, we should take the facts assumed by the district court as given and determine whether those facts state a violation of clearly established law. Skinner spends most of his brief on the jurisdiction question[2] arguing that the undisputed facts on the record do not give rise to a nexus between Shinault's political activities and this dismissal. But the relevant "assumed fact" is that Skinner fired Shinault for political patronage reasons, and Skinner does not contest the purely legal holdings

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[2]In response to a Tenth Circuit Order issued on August 3, 1995, the parties separately briefed the issue of jurisdiction in light of Johnson v. Jones. Petitioners urged in that brief, as in their principal appeal brief, that "[a]ll that this appeal asks the court to do is to assume the facts that the trial court assumed, and to determine whether those facts state a violation of clearly established law." (App. 57-58.)

> that such an action violates Shinault's First Amendment right of association or that such a right was clearly established at the time of the termination. Skinner contests the district court's factual determination, and thus we are without jurisdiction to review his appeal.

(App. 9-10.)

In Johnson, the district court order being appealed resolved the "fact-related dispute" about "whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial[,]" (115 S. Ct. 2153, some emphasis in original). The crux of Skinner's appeal, on the other hand, was whether the trial court erred in relying on the mere existence of a fact-related dispute to deny qualified immunity. Skinner's position was that under the facts assumed by the trial court, he was entitled to qualified immunity. (App. 57-64, 81-93.) That issue is purely a matter of law.

The Tenth Circuit, in its explicit application of Johnson to Skinner's appeal, broadly--and literally--applied Johnson's limitations on jurisdiction of qualified immunity appeals. Its order denying Skinner's appeal reasoned: "Indeed, an examination of Skinner's motivation for firing Shinault is just the sort of nebulous factual

assessment that Johnson leaves to the district courts. See Johnson, 115 S. Ct. at 2158." (App. 9, emphasis added.) The language in Johnson to which the circuit court apparently referred was that: "Many constitutional tort cases, unlike the simple 'we didn't do it' case before us, involve factual controversies about, for example, intent--controversies that, before trial, may seem nebulous." Id.

While this dictum in Johnson may certainly apply in some contexts, the Tenth Circuit has now construed it to foreclose appellate jurisdiction in First Amendment retaliation cases--cases where motive is highly likely to be an issue in dispute. Such an interpretation necessarily assumes that Johnson has by implication overruled previous case law which required an examination of whether the plaintiff's proffered proof is sufficient, as a matter of law, to sustain his initial burden of proof of a motivating factor, in qualified immunity appeals arising from a First Amendment retaliation claim. See Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977), and discussion at Proposition I, Part B, infra.

The Tenth Circuit's implicit rejection of Behrens' application to Skinner's appeal, by virtue of the glaring omission of any discussion of Behrens in the circuit court's decision, is further evidence that court interprets Johnson to foreclose jurisdiction over a qualified immunity appeal raising a Mt.Healthy causation or motivation issue. This is perhaps because this Court in Behrens, although giving short shrift to the contention Johnson precluded Behrens' appeal, noted that "typically, the issue [on appeal] is whether the federal right allegedly infringed was 'clearly established[.]'" Behrens, 116 S. Ct. at 842. In this case, the Tenth Circuit's order relies heavily on the fact that Skinner did not assert that the right to run for political office is not clearly established, or that an employee of the county could not be fired solely for that reason.[3] Those issues, however, were entirely beside the point.

The essence of the Tenth Circuit's ruling is that by virtue of

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[3]Skinner did argue on appeal that it is not clearly established that a public official cannot terminate an employee for violating county policy and for misusing county property; for one-year-old protected conduct which has no nexus to the termination; or for conduct occurring prior to being employed or promoted. (App. 92-93.)

the decision in Johnson, and despite Behrens, when the trial court decision rests upon a genuine issue of material fact as to motive in a First Amendment retaliation claim, the circuit court must take such a finding at face value, and may no longer exercise jurisdiction to examine de novo whether as a matter of law the plaintiff has met his burden of proof under Mt. Healthy. See discussion at Proposition I, Part B, infra.

Leaving aside whether the Tenth Circuit's application of Johnson was correct, Behrens should have served to clarify the law so as to lead the court to a different conclusion and bring it in line with other circuits' applications of Johnson to jurisdictional questions involving appeals of denials of qualified immunity. (See Proposition II, infra.) But even under the narrowest reading of the Tenth Circuit's opinion, public officials and employees serving within that circuit who seek appellate review of questions of law relating to qualified immunity in First Amendment retaliation cases will be denied the right of review whenever a district court finds merely that there is a dispute as to the motive for the adverse employment decision. Under

its broadest reading, giving the decision its full effect, the Mt. Healthy legal analysis of motive or causation is no longer required by the district court in this circuit. Neither Johnson nor Behrens calls for such an interpretation. The Tenth Circuit's denial of the right to appellate review thereby sanctions the trial court's erroneous ruling, and constitutes a vast departure by both courts from the accepted and usual course of judicial proceedings. Sup. Ct. R. 10.

B. Analysis of qualified immunity claims in First Amendment retaliation cases.

This Court's decision in Mt. Healthy established that in a First Amendment retaliation claim the plaintiff carries a heavy initial burden to show both (1) that he engaged in constitutionally protected conduct and (2) causation, that is, that the conduct was a substantial or motivating factor in his termination. On appeal the circuit court must determine, de novo, whether the plaintiff has carried this initial burden. If so, the appellate court must then go on to determine whether the defendant claiming qualified immunity has shown by a preponderance of the evidence that he would have reached the same

decision even absent the protected conduct. Mt. Healthy, 429 U.S. at 287. "Bare allegations of malice should not suffice[.]" Harlow v. Fitzgerald, 457 U.S. 800, 817, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Rather, the test must focus on "the objective legal reasonableness" of an official's acts. Insubstantial suits should not be allowed to proceed to trial. Harlow, 457 U.S at 818.

The essence of Skinner's position on appeal was that the trial court confused the distinction in qualified immunity cases between the factual dispute as to motive, and the legal dispute as to the conclusion to be drawn as a matter of law from the plaintiff's proffered proof of motive. This is precisely the problem recognized in Behrens when this Court, noting that the denial of summary judgment will always rest on a determination that there are controverted issues of material fact, 116 S.Ct. at 842, nevertheless reiterated the right to appeal the legal conclusions which a district court, whether directly or by implication, also resolves in denying summary judgment.

Denial of summary judgment in a First Amendment retaliation case merely because motive is disputed is precisely the result the Mt.

Healthy Court sought to avoid:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.

429 U.S. at 286. Nothing within the rule of Mt. Healthy was changed by Johnson, as Behrens makes clear. Nevertheless, under the Tenth Circuit's approach in this case, every employee who can offer proof he or she has ever exercised constitutionally protected conduct--even prior to employment, as here--can claim that alleged protected conduct supplied the motive for an adverse employment decision, and the hapless employer who denies it will ipso facto lose his claim to qualified immunity. The district court's confusion about the difference between the requirement that a plaintiff offer facts in proof of causation (which will always be disputed by the defendant when the case turns on questions of motive), and the legal conclusion to be drawn from those facts--their objective legal reasonableness--has now been sanctioned by the Tenth Circuit. As a result, the Mt. Healthy requirement that a plaintiff, as a matter of law, must sustain his initial

burden of proof, has been entirely abandoned in the circuit, under the auspices of Johnson.

The legal analysis long required by this Court in First Amendment retaliation claims is that the protected conduct was a motivating factor in the adverse employment decision, Mt. Healthy, 429 U.S. at 287, and/or that the defendant violated clearly established statutory or constitutional rights of which a reasonable person would have known. Behrens, Harlow v. Fitzgerald. Skinner and all other public officials within the jurisdiction of the Tenth Circuit are entitled to a meaningful appellate review of whether the trial court, as a matter of law, properly made those analyses. The Tenth Circuit's erroneous finding that it lacked jurisdiction to consider those issues under Johnson, based solely upon the district court's statement that a material question of fact exists on the issue of motive, has not only completely foreclosed Skinner's right to appeal the denial of his claim of qualified immunity, but has eliminated the plaintiff's initial burden of proof previously required as a matter of law under Mt. Healthy.

C. Skinner's position in the circuit court of appeals.

The district court found that the protected activity at issue in this case consisted of Shinault's "running against Defendant Skinner in the 1990 Democratic primary [and] Shinault's prior support of Neil Steely, who was defendant Krohmer's political opponent in the 1986 and 1990 elections." These events occurred prior to Shinault's employment by Skinner in 1991. (App. 32-33.)

The legal conclusions to be drawn from this undisputed evidence in connection with Shinault's First Amendment retaliation claim were the crux of Skinner's primary argument on appeal that as a matter of law he is entitled to qualified immunity. The Tenth Circuit clearly understood that Skinner's position on appeal was that the factual dispute over the reason for termination of Shinault's employment is immaterial to the issue of whether the district court erred in denying Skinner qualified immunity--a question of law. (App. 9-10.) Skinner urged that under Shinault's facts as found by the trial court, Shinault did not establish that protected conduct occurred, that it was a motivating factor in Skinner's decision to terminate Shinault's employment, or that Skinner violated clearly established

statutory or constitutional rights of which a reasonable person would have known. (App. 81-93.)

In denying jurisdiction, the circuit court's decision specifically acknowledged that Skinner's argument on appeal was "that the undisputed facts on the record do not give rise to a nexus between Shinault's political activities and his dismissal." (App. 10.) The court explicitly recognized that Skinner's contention was that under Johnson, the appeals court "should take the facts assumed by the district court as given and determine whether those facts state a violation of clearly established law." Id. This is exactly the type of appeal for which jurisdiction was found by this Court in Behrens.

Nevertheless, the Tenth Circuit refused to undertake any legal analysis of Skinner's claims. Instead, citing Johnson's reference to "motive" as an example of nebulous issues for the trial court, and the "magic words" in the district court's decision (that a genuine issue of material fact existed with respect to motive), the Tenth Circuit found it lacked jurisdiction to hear Skinner's appeal of the legal issues he raised. (App. 9.) The effect of the circuit court's decision is to

relieve plaintiffs within that circuit from the obligation to do more than allege or offer proof of some prior act of protected activity, and to return this circuit to the days before Mt. Healthy.

D. Appellate review of questions of law in qualified immunity cases is a valuable and well-established right, the wholesale denial of which is a vast departure from the accepted and usual course of judicial proceedings.

The defense of qualified immunity benefits not only the public official who claims it, but the public at large, who must finance the litigation, and whose public officials will be distracted from their governmental duties, inhibited in their discretionary actions, and perhaps deterred altogether from public service. Harlow, 457 U.S. at 816. It is a "**right** to immunity from certain claims;" and "when immunity with respect to those claims has been finally denied, appeal must be available." Behrens, 116 S. Ct. at 841 (emphasis added). Just as appealability "cannot be foreclosed by the mere addition of other claims to the suit," id., it must not be foreclosed merely because the district court makes a finding that a question of fact exists on the

issue of causation. Behrens, Mt. Healthy, Johnson.

In Behrens, this Court described the possible loss of the right of appeal from potentially erroneous adverse rulings on claims of qualified immunity as "intolerable." 116 S.Ct. at 842. Thus, in rejecting the respondent's position in Behrens, that appeal should not be available if other claims would still require trial, the Court said:

> If the district court rules erroneously, the qualified-immunity right not to be subjected to pretrial proceedings will be eliminated, so long as the plaintiff has alleged (with or without evidence to back it up) violation of one "clearly established" right[.]

Id. Likewise, if a district court in this circuit rules, however erroneously, that questions of material fact exist on the issue of motive, the Tenth Circuit's interpretation of Johnson, which forecloses appeal, emasculating Mt. Healthy in the process, is intolerable. Like other collateral orders, unless such a decision "can be reviewed before the proceedings terminate, it can never be reviewed at all." See Mitchell v. Forsyth, 472 U.S. at 525, quoting Stack v. Boyle, 342 U.S. 1, 12, 72 S.Ct. 1, 7, 96 L.Ed 1 (1952). Such a right cannot be effectively vindicated after the trial has occurred.

Mitchell v. Forsyth, 472 U.S. at 525, citing Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d at 651 (1977).

The denial of this well-established and valuable right to appeal, coupled with the Tenth Circuit's implicit finding that the Mt. Healthy initial burden of proof of causation is no longer good law, clearly constitutes a vast departure from the accepted and usual course of judicial proceedings. The cost of such a result to both the public and public officials is incalculable. It wholly defeats the public policy reasons underlying the recognition of the qualified immunity defense, denying public officials their "entitlement not to stand trial or face the other burdens of litigation[.]" Mitchell, 472 U.S. at 526. This Court should exercise its supervisory power to require the Tenth Circuit to assume jurisdiction of Skinner's qualified immunity appeal in light of Johnson, Behrens, and Mt. Healthy. Sup. Ct. R. 10(a).

PROPOSITION II:

THE TENTH CIRCUIT'S REFUSAL TO EXERCISE JURISDICTION OVER SKINNER'S APPEAL OF DENIAL OF QUALIFIED IMMUNITY, AND ITS EMASCULATION OF THE RULE OF MT. HEALTHY, IS IN CONFLICT

WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME MATTER, AND THEREBY DEPRIVES THE PUBLIC AND PUBLIC OFFICIALS AND EMPLOYEES SERVING WITHIN THE JURISDICTION OF THE TENTH CIRCUIT COURT OF APPEALS OF THE BENEFITS OF QUALIFIED IMMUNITY WHICH ARE AVAILABLE TO PERSONS IN OTHER JURISDICTIONS.

The Tenth Circuit's refusal to find jurisdiction to review questions of law, whether in the context of Mt. Healthy (see Proposition I, supra) or otherwise, is contrary to the decisions of courts of appeals in other jurisdictions, and represents a split among the circuits.

A. The appealability of a denial of qualified immunity under Behrens.

In Johnson v. Jones, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), this Court considered "the appealability of a portion of a district court's summary judgment order that, though entered in a 'qualified immunity' case, determine[d] only a question of 'evidence sufficiency[.]'" 115 S.Ct. at 2153. That kind of order was not appealable, the Court concluded, stating at the end of the opinion that "a defendant, entitled to invoke a qualified-immunity

defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." 115 S.Ct. at 2159.

Relying on Johnson, the Respondent in Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), argued, inter alia, that Behrens' "appeal of a denial of his summary judgment motion was not available because the denial rested on the ground that '[m]aterial issues of fact remain.'" 116 S.Ct. at 842. The Court in Behrens explicitly rejected that interpretation of Johnson, noting that "[e]very denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact[.]" Behrens, 116 S.Ct at 842, emphasis in original. Johnson, the Court said, held simply that "determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case." The Court went on to say that Johnson "reaffirmed that summary-judgment determinations are appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity[.]"

Behrens, 116 S.Ct. at 842, emphasis in original.

The Tenth Circuit's obligation, under Johnson and Behrens, to assume jurisdiction to review Skinner's First Amendment appeal on questions of law, would seem to be unmistakably clear.

B. The Fifth, Seventh, Eighth and Eleventh Circuit Courts have recognized their continued jurisdiction under Behrens to entertain qualified immunity appeals which turn on questions of law, regardless of whether there exist facts in dispute.

In Cantu v. Rocha, 77 F.3d 795 (5th Cir. 1996), decided February 28, 1996, the Fifth Circuit was asked to review the denial of both state and federal qualified immunity claims of the three defendants. Although material facts were in dispute, the court recognized as a matter of federal law that it had jurisdiction to hear the appeal:

> Although Ethridge squarely denies the conduct alleged by Cantu, his qualified immunity defense does not present the sort of "evidence sufficiency" point held not to be appealable in Johnson.
>
> . . . .
>
> In this case, review of Ethridge's assertion on appeal

> would not require this court to decide, on the basis of a limited record, a disputed factual issue that may well be resolved at trial, i.e., whether Ethridge engaged in the acts of which he was accused. The court simply must decide whether, under the facts as alleged by Cantu, Ethridge is entitled to qualified immunity under Texas state law.

77 F.3d at 805 (emphasis added).

Similarly, in Jemmott v. Coughlin, 85 F.3d 61 (2nd Cir. 1996), decided May 23, 1996, the defendants' motion for summary judgment on the ground of qualified immunity was denied by the district court because "plaintiff has raised questions of fact as to the defendants' actions and intent[.]" 85 F.3d at 66. For purposes of appeal, however, the Second Circuit found it had jurisdiction to review the district court's rejection of the defendants' argument that even if the plaintiff's allegations are accepted as true, no clearly established constitutional right was violated.

The Eleventh Circuit has also recognized that the right to appeal questions of law despite disputed facts, remains intact. See Beauregard v. Olson, 84 F.3d 1402 (11th Cir. 1996), decided June 12, 1996 ("In its order denying Olson immunity, the district court wrote

only that 'it is clear that genuine issues of material fact remain to be resolved[.]'. . . .For purposes of our review we accept as true both that Plaintiffs' job duties were ministerial and that Olson fired them for political reasons. Even so, Olson says he is entitled to qualified immunity. So, we have jurisdiction[,]" [citing Behrens v. Pelletier]). See also Cottrell v. Caldwell, 85 F.3d 1480 (11th Cir. 1996), decided June 3, 1996 ("[A]s clarified by Behrens, Johnson does not affect our interlocutory jurisdiction in qualified immunity cases where the denial is based even in part on a disputed issue of law.")

The Seventh Circuit, in Clash v. Beatty, 77 F.3d 1045 (7th Cir. 1996), affirming the trial court's order denying summary judgment based on a qualified immunity defense, has also correctly applied both Johnson and Behrens in its analysis of the trial court's decision. After a discussion of the two cases, the court found that it "lack[ed] the 'given facts' that either do or do not show a violation of 'clearly established law.'" Clash, 77 F.3d at 1048.

See also, Heidemann v. Rother, 84 F.3d 1021, 1027 (8th Cir. 1996), decided May 23, 1996 ("In rejecting defendants' qualified

immunity claim. . .the district court stated, without further explanation, that 'factual disputes exist in this action such that genuine issues of material fact remain for trial.' We, therefore, find it necessary to review the record and consider the legal context of plaintiffs' constitutional and statutory claims, in order to determine whether this interlocutory appeal raises abstract issues of law relating to qualified immunity over which we presently have jurisdiction. We hold that it does.")

In contrast, in the instant case thetrial court, finding Skinner denied the allegations of motivation for termination of Shinault's employment, ceased its inquiry. (App. 32-34, 39-40.) The Tenth Circuit, citing this finding, condoned the trial court's error and thereby departed from the analysis of other circuits in refusing to examine Skinner's legal assertions on appeal. (App. 9.)

It is clear that the Tenth Circuit's application of Johnson, and implicit rejection of the application of Behrens, to Skinner's appeal, constitutes a significant conflict with the decisions of other United States courts of appeals on the matter of jurisdiction of qualified

immunity appeals, and emasulates the continued viability of rules such as that in Mt. Healthy, which call for a de novo review of the sufficiency of the plaintiff's proferred proof as a matter of law.

SUMMARY

The Tenth Circuit's refusal to find it has jurisdiction to undertake de novo the legal analysis required by Mt. Healthy, implicitly rejects Behrens and evidences an assumption by that court that such an analysis is no longer required. The consequences impact not only Skinner, but also all other such officials or employees within the circuit, and the public, unjustly denying them the "entitlement not to stand trial or face the other burdens of litigation[.]" Mitchell v. Forsyth, 472 U.S. at 526, 105 S.Ct. at 2815. This Court should assume jurisdiction and reverse the judgment of the Tenth Circuit.

Respectfully submitted.

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